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No. 85-831

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS UNION, LOCAL 28,

Petitioner,

v.

KARIN SERITIS AND TERI DELOACHE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

INTRODUCTION

Pursuant to Rule 22 of the Rules of this Court, Respondents Karin Seritis and Teri DeLoache file this brief in opposition to the petition for a writ of certiorari filed by the Hotel and Restaurant Employees and Bartenders Union, Local 28 (Local 28).

COUNTERSTATEMENT OF THE FACTS

Respondents generally accept the statement of facts of Local 28, except for the following additions and clarifications which are necessary to understand fully the issues in this case.

As exclusive bargaining agent under the collective bargaining agreement with most restaurants in the East Bay Area, new employees hired by such a restaurant could only obtain employment through the exclusive hiring hall operated by Local 28 (Plaintiffs' Exhibits I 7, 8).* After her initial encounter with Ray Lane, at the time chief executive officer of Local 28, Respondent Seritis was never referred to a job by Local 28; but instead found her own employment where she worked eighteen months, until the restaurant closed in 1976 (RT I 92, 93). She then sought and obtained a job (without procuring a referral from Local 28) with Sambo's Restaurant, which had a collective bargaining agreement with Local 28 (RT I 93). Union agents testified that this direct hiring off the street rather than through the hiring hall was a common practice (RT I 74, 128, 140, 142). However, Lane singled out Respondent Seritis and had her employment terminated while permitting another employee in the same situation to remain on the job. His action came in spite of an arrangement between the business agent of Local 28 and the employer to permit Respondent Seritis to sign up with the union and continue working (RT I 74, 94, 128, 138, 139, 140, 142).

In that same year Respondent DeLoache also sought a referral to a waitressing job at Local 28 (RT I 11:6-9, 13, 14:14) and received the same offers of sex and sexual employment received by Respondent Seritis.

Both Respondents suffered severe emotional distress as a result of their encounters with Lane and Local 28. (RT I 26, 78, 105, 106, 114, 206, 211, 212, 215, 216).

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* Roman numeral I, with respect to the Reporter's Transcript (RT) and Exhibits, refers to the first trial and II refers to the second trial.

There was extensive testimony that the Respondents' experiences with Local 28 were not isolated incidents but were instead representative of Lane's long-standing practices, practices that occurred with the knowledge of other Local and International union officials (RT I 91, 97, 125, 153, 189).

On the question of net worth of the Petitioner, there are some significant facts omitted in Local 28's petition. It was never established that Local 28 had a legally binding contingent liability for death benefits. But assuming that there were such a liability, Local 28 has paid these claims from its general fund for some time. (RT II 28:20). From an accounting standpoint, in evaluating the burden of the payment of death benefits in future years, one must also consider income to be received by the general fund in those years (RT II 70:17-28, 71:1-10). The total anticipated income from dues at the present level over the time period of liability for death benefits was projected at $39,156,000, which, discounted by the same factor used in calculating liability, has a present value of $7,182,541 (RT II 117:25-28). Thus, the present value of the death benefit is approximately $200,000, while the present value of the dues to be received over that time is $7,000,000.

Consequently, the calculations set forth in the petition by Local 28 are totally inappropriate and not worthy of consideration in connection with the issues raised.

REASONS FOR DENYING THE WRIT

Given the facts of this case, granting a writ of certiorari would be inappropriate for two reasons. First, puni-

tive damages are not barred by statute or by the decision of this Court in *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 99 S. Ct. 2121, 60 L.Ed.2d 698 (1979), in a duty of fair representation case where the facts do not involve the failure to process a grievance but where, in fact, there has been conduct of a criminal nature. Second, it is well established, in a long line of cases on the subject, that Respondent DeLoache's claim is not preempted by the National Labor Relations Act.

I. Punitive Damages Are Appropriate In A Duty Of Fair Representation Case Where The Breach Of The Duty Arises From Intentional Conduct Of A Criminal Nature.

Petitioner contends that it was inappropriate and contrary to legal precedent for the trial court to award punitive damages for breach of the duty of fair representation. Local 28 contends that punitive damages are *per se* not permissible in any type of duty of fair representation case, irrespective of the circumstances of the breach. In support of its position Local 28 relies on the opinion of the United States Supreme Court in *Foust*, *supra*.

The punitive damage award in *Foust* was based on the reckless disregard of the plaintiff's rights to proper representation by the failure of the union to process a grievance. The case did not involve overt and intentionally malicious conduct such as is present in this case. This Court in *Foust* held that no matter how negligent a union may be in failing to process a grievance properly, punitive damages are not appropriate. Here, Respondents' claims, under the duty of fair representation, were

not based upon inadequate representation in filing and processing grievances. Seritis and DeLoache rely instead on coercion by the chief official of Local 128 to accept illicit sexual employment, and on the harassment and retaliation by Local 28 when they refused to comply with these sexual demands. Unlike *Foust*, the case does not involve a grievance filed against an employer by either Respondent, nor negligence on the part of Local 28 in processing such a grievance. In fact, there is no allegation of employer misconduct of any kind. The gravamen of the case at bar is overt acts by a union official which were intentional, malicious, harassing and criminal rather than a failure to offer adequate protection or assistance in the context of grievance processing.

In many cases, breach of the duty of fair representation does involve the failure of the union to process a grievance properly; but, the duty of fair representation also applies to any situation where the union represents the interest of the bargaining unit employees as their exclusive bargaining agent. *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L.Ed.2d 80 (1957); *Humphrey v. Moore*, 373 U.S. 335, 84 S. Ct. 363, 11 L.Ed.2d 370 (1964); and *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 96 S. Ct. 1048, 47 L.Ed.2d 231 (1976). Respondents submit that this Court, in *Foust*, did not set forth a rule that would grant a union carte blanche to engage in intentionally and egregiously wrongful conduct against the members of the collective bargaining unit without risk of an award of punitive damages under a duty of fair representation claim. Petitioner Local 28 would have itself insulated from an award of damages for any type of conduct in which it might engage. However, although it may be argued that public policy sup-

ports the insulation of a union from punitive damages from negligence in carrying out its proper duties in a grievance situation, such policy certainly would not support the insulation of the union where it has engaged in intentionally overt and wrongful conduct of a criminal nature. The trial court in this case was absolutely correct in ruling that *Foust* is a very narrow holding limited to its facts and is inapplicable here. It applies only to those situations where a union, as collective bargaining agent, has failed to process a grievance properly. Punitive damages are available in suits under 29 U.S.C. § 185 where a union acts in an outrageous and malicious fashion in breaching the duty of fair representation. The court in *Murphy v. Operating Engineers, Local 18*, 99 L.R.R.M. 2074 (N.D. Ohio 1978), relied upon this principle in awarding $150,000 in punitive damages against a local union.

Foust cannot be read to support Local 28's assertion that punitive damages are unlawful in all duty of fair representation claims regardless of how serious, egregious or wrongful the acts complained of are. Subsequent judicial precedent construing the holding in *Foust* simply does not support the *per se* rule that Petitioner alleges this Court adopted. In *Anderson v. United Paperworkers International Union*, 484 F. Supp. 76, 84-85 (D. Minn. 1980), *vacated and remanded on other grounds*, 641 F.2d 574 (8th Cir. 1981), the District Court specifically considered the impact of *Foust* on a duty of fair representation claim which did not involve the processing of a grievance. That court held that *Foust* does not impact such duty of fair representation claims, reasoning as follows:

> If *Foust* articulated a *per se* rule forbidding punitive damages in *all* DFR cases, then this Court must vacate that portion of the judgment awarding punitive damages. If *Foust* did not create a *per se* rule, or if such a rule applies only to a specific class of cases, then there remains the question of whether the punitive award was appropriate in the instant case.
>
> Although Mr. Justice Blackmun, in his concurring opinion, characterized *Foust* as creating a *per se* rule against punitive damages in all DFR cases, 99 S. Ct. at 2128, Mr. Justice Marshall's majority decision did not characterize its holding as such. Furthermore, the Court limited its holding to only those DFR cases where the Union "breaches its duty of fair representation *by failing properly to pursue a grievance*." 99 S. Ct. at 2128 (emphasis added). It would appear that even if the Court intended to create a *per se* rule in *Foust*, it would apply only where a Union failed to properly pursue a grievance. The instant case is not a garden variety of DFR case. . . .
>
> Since this case does not involve a failure to pursue an employee's grievance, this Court finds the ruling in *Foust* instructive, but not specifically controlling. [Footnote omitted.]

In awarding punitive damages for conduct of the sort that was present in the case at bar, a United States district court in *Maxwell v. UAW, Local 1306*, 489 F. Supp. 745, 753 (C.D. Ill. 1980) held that "[t]he better view, in light of the Congressional policies behind the LMRDA appears to be that punitive damages are recov-

erable upon proof of either actual malice or reckless or wanton indifference to the rights of the plaintiff."

In *Bise v. International Brotherhood of Electrical Workers, Local 1969*, 618 F.2d 1299 (9th Cir. 1979), *cert. denied*, 449 U.S. 904 (1980), another case arising after *Foust*, the Court of Appeals there held that punitive damages are available under a duty of fair representation claim. The *Bise* case has a great deal of similarity to the case at bar in that it involved harassing conduct by a union which resulted, among other things, in intentional infliction of emotional distress. The Ninth Circuit, in the *Bise* case, specifically addressed the issue of the appropriateness of punitive damages in a duty of fair representation case and, citing with approval *International Brotherhood of Boilermakers v. Braswell*, 388 F.2d 193 (5th Cir. 1968), *cert. denied*, 391 U.S. 935, 88 S. Ct. 1848, 20 L.Ed.2d 854 (1968), upheld the award as follows:

> Although there is much controversy whether punitive damages are recoverable under the LMRDA, this Court has adopted the view that they are. Punitive damages are proper where the plaintiff can establish actual malice or reckless or wanton indifference to his rights. . . . [P]unitive damages are permissible to vindicate the invasion of those protected rights and as a deterrence against future violations by over-zealous unions and their officers. [Citations omitted.]

618 F.2d at 1305-06. The *Bise* court noted:

> We are aware of the Supreme Court's ruling in *IBEW v. Foust* [citation omitted], but find it inapposite here. *Foust* did not overrule or cast doubt on

> this court's decision in *Cooke*. [*Cooke v. Orange Belt District Council of Painters No. 48*, 529 F.2d 815 (9th Cir. 1976)].

618 F.2d at 1305 n.6.

In that same *Cooke* case, the Court of Appeals for the Ninth Circuit held that an award of punitive damages under appropriate circumstances would serve as a deterrent to the abuses that Congress sought to prevent by imposing a duty of fair representation upon unions. The *Cooke* case also relied upon the reasoning in *International Brotherhood of Boilermakers v. Braswell, supra.* In *Braswell* the Court of Appeals upheld a punitive damage award in a duty of fair representation type case and cited as persuasive the following statement by the Appellate Division of the New York Supreme Court in the case of *Fittipaldi v. Legassie*, 239 N.Y.S.2d 792, 796, 18 A.D.2d 331, 335 (1963):

> Strong reasons of policy promote the use of exemplary damages to deter union officials from conduct designed to suppress [employee rights]. . . . The very basis for the existence of unionism in our society today is the promise of employment to those who desire to associate freely in order to obtain it. The right of the working man to the benefits of collective bargaining is too essential and valuable to be hindered, impeded and seriously damaged by irresponsible and dictatorial leaders whose dominance in any given situation does great disservice to the purpose and principles of unionism. . . . Imposition of exemplary damages, when the requisite elements of malice, gross fraud, wanton or wicked conduct, violence or oppression are present, serves to achieve the deterrence they were designed to effect.

In *Parker v. Local Union No. 1466, United Steelworkers*, 642 F.2d 104 (5th Cir. 1981), the court of appeals there again awarded punitive damages in a duty of fair representation type case long after the decision in *Foust* was rendered. The court of appeals there specifically found unpersuasive the union's argument that the decision in *Foust* precludes an award of punitive damages regardless of circumstances. The court felt that punitive damages were appropriate where the union acts with actual malice or reckless or wanton indifference to the rights of others. Likewise, in *Shimman v. Frank*, 625 F.2d 80 (6th Cir. 1980), another court of appeals upheld an award of punitive damages in the context of a duty of fair representation case. That case, like the one at bar, involved harassment and abuse of the plaintiff by union officials. The *Shimman* court noted that there appeared to be some dispute as to the scope of the Supreme Court decision in *Foust* but concluded that punitive damages were warranted in a case involving harassment and abuse. The *Shimman* court decided that punitive damages were proper where the purpose was not to destroy but to deter the wrongdoing and serve as an example to others not to engage in such conduct.

Petitioner relies on the case of *Bowen v. United States Postal Service*, 459 U.S. 212, 103 S. Ct. 558, 74 L.Ed.2d 402 (1983), as further precedent for its contention that punitive damages are not permissible in a duty of fair representation case. However, *Bowen* also involves grievance processing and is inapplicable to the situation in this case.

The evidence presented at trial showed, and the trial court found, that there was malice and reckless disregard

of employee rights; and the award of punitive damages by the trial court was intended to act as a warning to others that severe consequences will result where a member of the collective bargaining unit is sexually harassed in a malicious manner by the union through one of its agents. The *Foust* decision does not prohibit or impact the award of punitive damages in a case such as the one at bar, where the issue involved is conduct of a malicious, harassing, and criminal nature and not failure by the union to process a grievance.

II. The California Court's Award For Respondent DeLoache On Her Claim Of Intentional Infliction Of Emotional Distress Is Not Preempted By The National Labor Relations Act.

Petitioner contends that the trial court was without jurisdiction to award damages for intentional infliction of emotional distress based on the assertion that this tort claim is preempted by federal law. However, Petitioner's contention is contrary to well-settled precedent. Unions may be liable for torts committed by their officers, and such tort claims are not preempted by the National Labor Relations Act (NLRA) except under narrow circumstances not pertinent here. Although discriminatory conduct by a union may give rise to the jurisdiction of the National Labor Relations Board (NLRB), a state court also has jurisdiction where that discriminatory conduct is abusive, outrageous and has resulted in emotional distress. Such an instance of abuse is abundantly established under the facts of the case at bar.

Specifically, the question of the potentially preemptive

impact of the NLRA upon a state law claim for intentional infliction of emotional distress has been considered and resolved against Petitioner's theories by this Court. In *Farmer v. United Brotherhood of Carpenters, Local 25*, 430 U.S. 290, 302, 97 S. Ct. 1056, 1064, 51 L.Ed.2d 338, 351 (1977), this Court said, in referring to the preemption doctrine as set forth in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S. Ct. 773, 3 L.Ed.2d 775 (1959):

> Our cases indicate, however, that inflexible application of the doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme.

This Court went on to say:

> The State, on the other hand, has a substantial interest in protecting its citizens from the kind of abuse of which Hill complained. That interest is no less worthy of recognition because it concerns protection from emotional distress caused by outrageous conduct, rather than protection from physical injury, as in *Russell*, or damage to reputation, as in *Linn*. Although recognition of the tort of intentional infliction of emotional distress is a comparatively recent development in state law . . . our decisions permitting the exercise of state jurisdiction in tort actions based on violence or defamation have not rested on the history of the tort at issue, but rather on the nature of the State's interest in protecting the health and well-being of its citizens.

430 U.S. at 302-03, 97 S. Ct. at 1064-65, 51 L.Ed.2d at 351-52.

In reviewing the scope of the federal scheme of regulation under the National Labor Relations Act and, on the other hand, state tort law which has as its purpose the prevention of intentional infliction of emotional distress, this Court said:

> Viewed, however, in light of the discrete concerns of the federal scheme and the state tort law, that potential for interference is insufficient to counterbalance the legitimate and substantial interest of the State in protecting its citizens.

430 U.S. at 304, 97 S. Ct. at 1065, 51 L.Ed.2d at 352.

In ruling on the emotional distress claim, it was unnecessary for the trial court in the case at bar to determine whether or not Local 28 had discriminated or threatened to discriminate against Respondent DeLoache in violation of the National Labor Relations Act. Recovery for the tort of intentional infliction of emotional distress under California law requires proof only that the defendant intentionally engaged in outrageous conduct causing the plaintiff to have emotional distress. *State Rubbish Collectors Assn. v. Siliznoff*, 38 Cal. 330, 240 P.2d 282 (1952); and *Alcorn v. Anbro Engineering, Inc.*, 2 Cal. 3d 493, 86 Cal. Rptr. 88, 468 P.2d 216 (1970).

In the case at bar, the emotional distress for which damages were awarded by the lower court was a function of the particularly abusive manner in which the discrimination in employment was accomplished or threatened. Under such circumstances, the Supreme Court, in *Farmer v. Carpenters, supra*, specifically held that the preemption doctrine does not apply. In *Farmer* the Court said:

> Simply stated, it is essential that the state tort be either unrelated to employment discrimination or *a function of the particularly abusive manner in which the discrimination is accomplished or threatened* .... [Emphasis added.]

430 U.S. at 305, 97 S. Ct. at 1066, 51 L.Ed.2d at 353. In this case, the chief executive officer of Local 28 conditioned Respondents' job referrals on sexual relations with him and other union officials as well as on acts of prostitution and pornography. And, as if these conditions were not enough, Lane laced them with threats of underworld connections and violence and his power to determine who worked. This was "particularly abusive conduct" without question—conduct subject to state court jurisdiction.

There is absolutely no basis whatsoever for Local 28's contention that DeLoache's claim for intentional infliction of emotional distress is outside the *Farmer* exception to preemption. The tortious conduct was a function of the "particularly abusive manner" in which discrimination was accomplished or threatened and thus falls directly within the *Farmer* rule, 430 U.S. at 305, 97 S. Ct. at 1066, 51 L.Ed.2d at 353. As observed by the superior court and cited by the court of appeal in *DeLoache v. Lane*, A014245, 1 Civ. 52875 (June 3, 1983), "where, as here, a person in any position of power to grant or withhold employment opportunities uses that authority to attempt to induce workers and job seekers to submit to sexual advances, prostitution, and pornographic entertainment, and boasts of an ability to intimidate those who displease him, the tort of willful infliction of emotional distress is committed if harm is shown." The court of appeal found "substantial evidence" that the acts of

Local 28 were "oppressive, malicious, outrageous, despicable, arbitrary, in bad faith, discriminatory, abusive, criminal, and wanton." (Appendix A to Petition, A-6). Thus, where, as here, abusive and outrageous conduct which indisputably results in severe emotional distress has occurred, that abuse and resulting distress are separately actionable under state law irrespective of the presence of a collateral federal claim that the conduct was also discriminatory.

Petitioner states in its Petition for a Writ of Certiorari that the facts of the case of *Carter v. Sheet Metal Workers' Assn.*, 724 F.2d 1472 (11th Cir. 1984) is closely analogous to DeLoache's emotional distress claim, and thus her claim is preempted under the theory of that case. However, *Carter* involved a union member who brought an action against an international union asserting that the international had failed to intercede on the member's behalf when the local union refused to reinstate his union card. The union member claimed that this failure to reinstate had caused him great emotional distress. Thus, in *Carter* the emotional distress was merely an element of damage resulting from the union's failure properly to carry out its duties. There was no intentionally abusive or outrageous conduct separate from the union's failure to meet its obligations. Therefore, the emotional distress suffered in *Carter* did not fall within the *Farmer* exception because it was not related to any particularly abusive or outrageous conduct or manner in which the discrimination occurred. In fact, the principles of law as stated by the *Carter* court support Respondent DeLoache's position that her claim for intentional infliction of emotional distress is not preempted. In the case at bar, the emotional distress claim is a matter of only

peripheral concern to the federal labor policy, and the outrageous conduct is so deeply rooted in local law that the state's interest in regulating it is compelling. ***Belknap, Inc. v. Hale***, 463 U.S. 491, 103 S. Ct. 3172, 77 L.Ed.2d 798 (1983). The trial court found Lane's conduct to be not only intentional, outrageous and abusive but criminal in nature; therefore, there can be no question that there is a compelling state interest to regulate such conduct.

CONCLUSION

For the foregoing reasons, this Court should deny the petition.

Respectfully submitted,

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